Sunland Construction Company, Inc. *and* Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO. Cases 10–CA–24874 and 10–CA–25061

June 30, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On August 23, 1991, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent and the Charging Party filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Sunland Construction Company, Inc., Courtland, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.[2]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees that an employee received an unfavorable work assignment because the employee was wearing a badge of the Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO, or because our employees wear the badge of any labor organization.

WE WILL NOT discharge, change the work assignments, lay off, or refuse to reinstate our employees because they engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Timothy Owens, Larry Jackson, Charles F. Kilpatrick, Ralph O. Moore, Dan H. Murchie, James C. Robbins, Jonathon L. Rudolph, and Thomas C. Vickers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify Timothy Owens, Larry Jackson, Charles F. Kilpatrick, Ralph O. Moore, Dan H. Murchie, James C. Robbins, Jonathon L. Rudolph, and Thomas C. Vickers that we have removed from our files any reference to their discharges or layoffs and that the discharges and layoffs will not be used against them in any way.

SUNLAND CONSTRUCTION COMPANY, INC.

Keith R. Jewell, Esq., for the General Counsel.
Frederic Gover, of Dallas, Texas, for the Respondent.
Michael T. Manley, Esq., of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Decatur, Alabama, on April 10, 11, and 12, 1991. The charge in Case 10–CA–24874 was filed on July 27, 1990. The charge in Case 10–CA–25061 was filed on November 28, 1990, amended on January 7, and second amended on January 22, 1991.

A consolidated complaint issued on March 4, 1991. The complaint alleges that Respondent laid off an employee, changed the work assignments of an employee, and discharged employees in violation of Section 8(a)(1) and (3) and that Respondent threatened an employee that an employee had received a particular work assignment because of protected activity in violation of Section 8(a)(1) of the Act, and that Respondent engaged in conduct inconsistent with the terms of a settlement agreement.

[1] The Respondent and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have conformed the notice to the recommended Order.

On April 24, 1991, I received from the Charging Party, copies of Charging Party's Exhibits 2 and 6. Those exhibits had been withdrawn from the record for copying. On April 29 and June 4, 1991, I received from Respondent, letters dated April 25 and May 31 along with Respondent's Exhibits 7, 8, and 9. Respondent submitted those exhibits for inclusion in the record.

The record shows that Charging Party's Exhibits 2 and 6 and Respondent's Exhibits 7, 8, and 9 were received in evidence. Respondent's Exhibit 9 was already included in the court reporter's records.

I shall include in the original record the exhibits mentioned above which had not been included in the court reporter's submissions of the exhibits.

During the hearing, General Counsel argued that I should notice an administrative law judge decision in JD–214–89 as it regards the issue of animus. That is a decision by Administrative Law Judge Harmatz involving Respondent at another location.

On June 1, 1991, after the close of the hearing, Charging Party filed a ''Motion to Take Notice of Subsequent Decision.'' Charging Party contends that I should take notice of another administrative law judge decision involving the Respondent, for the purpose of animus. That is a decision by Administrative Law Judge Grossman.

On the record, Respondent argued that I should not consider Judge Harmatz' decision because it did not involve the same location as is involved in this matter and because that decision was under consideration by the Board on appeal.

The Charging Party argued that it was proper for me to consider an administrative law judge decision, citing the case of *Southern Maryland Hospital Center*, 293 NLRB 1209 (1989).

On June 8, Respondent filed a response in opposition to Charging Party's motion. As to the basis for its opposition to the Charging Party's motion, Respondent argued:

> The Charging Party asks for the Administrative Law Judge to take notice of the decision ''for the purpose of animus.'' However, Judge Grossman's decision concerns allegations occurring in 1989, months before any of the alleged conduct by either the Respondent or the Charging Party at the case at bar. Furthermore, Respondent's management of the Courtland, Alabama project (which is the project involved herein) was completely different than the management involved in the three projects under consideration in Judge Grossman's decision. All of the relevant decision makers at Courtland (Danny Stuckey, John Wayne Smith, Greg Reeves, Dan Stacey, Charlie Russell, and Joe Duran) had no involvement whatever on the projects involved in Judge Grossman's decision. Therefore, it would be clear error and completely presumptuous to impute ''animus'' to these individuals or their actions under the circumstances.

The General Counsel, in his brief, argued that Respondent's Courtland, Alabama manager of construction, A.B. Williford, was also involved in the matter heard and decided by Judge Harmatz.

I have decided that this situation is unlike the situation that developed in *Southern Maryland Hospital Center*. As noted by Respondent, the earlier cases failed to establish animus among the supervisors here. The General Counsel noted in his brief that A.B. Williford was involved in the matter before Judge Harmatz. Although a letter was delivered to A.B. Williford on July 26 by seven alleged discriminatees in this matter, there was no showing of actual involvement by Williford in the matters alleged as violations.

I am unable to consider the decisions of Judges Harmatz and Grossman in determining whether Respondent illustrated antiunion animus at its Courtland, Alabama job. I am aware of evidence in this instant record to the effect that Respondent's corporate policy is to resist union organization by all legal means. Moreover, as I find, the evidence does show animus among the supervisors at Courtland. However, I arrived at those determinations solely on the basis of the record and without reliance on the decisions of Judges Harmatz and Grossman.

I make the following findings on the basis of the entire record, my observation of the demeanor of witnesses, and after consideration of briefs filed by Respondent and the General Counsel.

Respondent admitted that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act; that it is a Delaware corporation engaged in the construction business at its place of business in Courtland, Alabama; and that, during the past calendar year, it has received at its Alabama facilities goods valued in excess of $50,000 directly from suppliers located outside the State of Alabama.

Respondent admitted that the Charging Party (Union) is, and has been at material times, a labor organization within the meaning of Section 2(5) of the Act.

On July 26, 1990, Respondent discharged employees Larry Jackson, Charles F. Kilpatrick, Ralph O. Moore, Dan H. Murchie, James C. Robbins, Jonathon L. Rudolph, and Thomas C. Vickers.

On the morning of July 26, the above-mentioned seven employees that were discharged later that day, delivered a letter to A.B. Williford, Respondent's manager of construction:

> Be advised that the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO and your construction employees at the Champion International Mill, Courtland, Alabama are engaged in organizing activity that is protected under Section 7 of the National Labor Relations Act.
>
> The below listed employees wish to be identified as members of the organizing committee:
>
> /s/ Charles F. Kilpatrick
> /s/ Thomas C. Vickers
> /s/ Ralph O. Moore
> /s/ Jonathon Rudolph
> /s/ Dan H. Murchie
> /s/ Larry Jackson
> /s/ James C. Robbins

Respondent stipulated that Kilpatrick, Vickers, Moore, Rudolph, Murchie, Jackson, and Robbins were discharged later on July 26 because each of those employees wore union badges on the job. Respondent contented that the employees were discharged for wearing unauthorized badges which happened to be union badges. Employees were required to wear

badges identifying them as subcontractor employees of Brown and Root Construction Company. Respondent contends that the employees were prohibited from wearing badges other than the Brown and Root badges.

One of the discharged employees, Ralph Moore, testified that he returned to the personnel office on July 30, 1990, and asked for a copy of the rule regarding wearing unauthorized badges. Moore testified that Terry, who was in charge of Respondent's personnel office, told the clerical employee to show Moore a copy of the rule. Terry then said, ''I don't mind hiring union people but I don't appreciate them trying to organize the job.''

Respondent's rule 42 in its jobsite safety rules states:

> 42. Badges worn on employee person, other than company employee badge, are not allowed.

Respondent contended that it prohibited employees from wearing badges other than Brown and Root badges, in order to prevent solicitation of any type.

Donald Hathorn testified that he was Respondent's office manager at its Courtland site during material times. Hathorn testified that the no-badge rule prevented solicitation and, under certain circumstances, could involve safety because a large badge may be unsafe in some work areas.

After unfair labor practice charges were filed, Respondent agreed to settle the allegations that its July 26 discharges were unlawful. That settlement was executed on a regular NLRB form. Among other things Respondent agreed to make whole the alleged dischargees by reinstating them to their former jobs without prejudice to their seniority or other rights, privileges, or working conditions. The parties stipulated that the seven discharged employees were put back to work by Respondent on August 16, 1990, and paid back wages. The parties distinguished back wages from other matters such as possible benefits in addition to wages.

Ralph O. Moore

In settlement of the charges alleging the July 26 discharges, Respondent put those employees including Ralph O. Moore back to work. Moore returned on August 16, 1990. Moore testified that he was told by ''Becky,'' who handled employees' insurance for Respondent, that he was considered a new employee from August 16 as to his eligibility for insurance. The General Counsel contends that evidence, which was disputed by evidence offered by Respondent, illustrates that Moore was not reinstated in accordance with the settlement agreement. Instead, according to the position of the General Counsel, Moore was actually rehired on August 16.

Respondent called two people that testified they were the only employees, timekeepers, that responded to employee inquires on the job about insurance. Those two, Angie Bolan and Terry Michele Mitchell, testified that Ralph Moore did not question either of them about his insurance coverage.

After August 16, Moore wore union badges at work and he solicited employees to support the Union while he was at work. Moore wore two different union badges. One of Moore's union badges was smaller than the other. Moore's supervisor, John Wayne Smith, admitted that Moore wore a union badge while working.

Moore testified that he passed out union leaflets at the jobsite and that some supervisors saw him passing out those leaflets.

According to Moore, he overheard Superintendent of the Precipitator McNutt talking over his radio during a conversation between McNutt and Moore about a week or two after Moore returned to work on August 16. Moore overheard McNutt being informed that Jonathon Rudolph was quitting. McNutt grinned and said, ''Well, I figured that was coming.'' Jonathon Rudolph was one of the seven employees discharged on June 26. Rudolph, like Moore returned to work for Respondent on August 16 pursuant to the settlement.

On September 12, 1990, according to Moore, Superintendent Greg Reeves came to him and while pointing to Moore's union badge, asked Moore where was his small badge. Moore told Reeves that he had a small badge but that he wore the large one ''cause it could be seen better.'' A week later, while he was on an elevator on the job with Greg Reeves, Reeves said to Moore, ''You need to get you a large badge. I can't read that one.'' At that time Moore was wearing the smaller of his two union badges. Moore responded to Reeves, ''I have a large one but I kind of like this one.'' Reeves said, ''Well, I've got some at home if you need them.''

Greg Reeves denied that he asked Moore about Moore's union badges.

On November 10, 1990, Ralph O. Moore was laid off. His termination notice indicated as reason for termination, ''reduction in force.'' Some other employees in the same job as Moore, were retained after November 10.

According to John Wayne Smith, he selected Moore for layoff rather than other more recently hired welders including Doug Patterson who was hired a few days before November 10. Smith testified that Doug Patterson was able and willing to perform all assigned jobs. According to Smith, Moore was reluctant to perform some jobs.

However, Smith admitted that he had never disciplined Moore because of Moore's work and Smith testified about only one specific occasion when, according to Smith, Moore failed to perform a specific assignment.

Smith testified that during the week before the layoff, his crew including Moore, was working an ''outage'' on the old boiler. During the outage, which according to Superintendent Danny Stuckey lasted 5-1/2 days, the old boiler was shut down due to the work. It was important to get the old boiler back in operation as soon as possible. Therefore, the outage involved around-the-clock operation.

While working the outage, Moore and work partner Roy Farlow were unable to guarantee one particular welding job. Moore testified that particular welding job was so tight that he had to remove his prescription eyeglasses to perform the weld. Moore told his supervisor that he could not guarantee that the weld would pass an X-ray inspection because of his inability to see. That supervisor, Jack Blankenship, told Moore that he should not do the weld unless he could guarantee it.

According to Smith, instead of complaining that they could not guarantee the weld, Moore and Moore's partner, Roy Farlow, actually refused to perform a weld.

The evidence is unrebutted that Moore was not disciplined because of his not making the questioned weld. Moore continued to work until the end of the outage when he, along

with several other employees, including Roy Farlow, were released in a general layoff. Others, including welder Doug Patterson, who was employed a few days before Moore's layoff, were retained.

During the week before Moore was transferred to the old boiler on the outage, it was apparent that the premium welding was running out. Some of the welders had expressed an intent to leave when the premium work was completed. On the premium work welders were paid a premium if the work passed X-ray inspection.

After he returned to work on August 16, Moore complained to Greg Reeves that he had not been assigned enough premium work. Moore asked and Reeves agreed with Moore that he did not like Moore.

A few days before the outage work on the old boiler, Foreman John Wayne Smith asked Moore if he would leave when the premium work ran out. Moore told Smith that he would stay on the job. Smith did not deny Moore's testimony in that regard.

Around the time of the layoff Moore was asked by Danny Stuckey if he would go to work temporarily on a job of Respondent which was out of State. Moore testified that at that time Respondent knew that he was under court order not to leave Alabama. Moore told Stuckey that he could not accept the out-of-state job because of the court order.

Credibility Determinations

As to credibility, I found Moore to be a believable witness. I was impressed with his demeanor. In some respects his testimony was either not contested or it agreed with the testimony of Respondent's witnesses. To the extent his testimony conflicted with that of John Wayne Smith and Danny Stuckey, I credit Moore.

The relevant testimony which was in dispute dealt primarily with Respondent's bases for its determination that Moore should be selected for layoff.

Smith and Stuckey testified generally as to Moore's work and especially in regard to whether Moore demonstrated a reluctance to perform some assigned jobs. However, Smith's testimony demonstrated uncertainty as to what if anything, Moore actually said to him regarding his work preferences. Moreover, Smith, who testified that Moore wasted time, was unable to recollect specific occasions in which Smith was reprimanded or cautioned about wasting time.

The testimony of Respondent's witness Greg Reeves, construction superintendent of the Boilermakers, illustrated that approximately a week before Moore was laid off, Respondent was concerned with having enough welders to handle the planned outage on the old boiler. Around that time Respondent hired welders to handle that added need.

Additionally, according to Greg Reeves, Respondent was also concerned at that time with maintaining enough welders because it anticipated that some of the welders would be leaving because the premium work was ending.

The premium work was work that qualified for X-ray examination, and, if the work passed, the welder received an additional $30.

Ralph Moore was asked if he would stay after the premium work ended and he told John Wayne Smith that he planned to stay until the job ended. Additionally, Moore was asked if he wanted to take one of Respondent's out-of-state jobs.

That evidence illustrates that Respondent was satisfied with the work of Ralph Moore. In that regard Greg Reeves testified that Moore was a good welder even though Reeves also testified that he agreed with Smith's assessment of Moore's work.

I did not find Greg Reeves to be a believable witness. However, his testimony as to the events which preceded the outage on the old boiler and Respondent's concern with having enough welders to take care of both the old and new boiler work, and its concern with welders leaving when premium work ended, is in accord with the full record. I credit that testimony.

That evidence shows that Respondent exaggerated Ralph Moore's shortcomings. Rather than finding Moore's work was generally unacceptable, John Wayne Smith was concerned during the first week in November with whether Moore would be one of the welders that would leave when the premium work ended and Moore's supervisors were interested in whether Moore would volunteer for an out-of-state job.

Additionally, the record cast doubt on the credibility of Smith and Stuckey's analysis of the comparative abilities of Doug Patterson and Ralph O. Moore. According to their testimony they decided to retain Patterson, who admittedly was a recent hire, as opposed to Moore because Patterson had demonstrated a full range of ability and willingness to perform welding jobs.

An examination of Patterson's employment record shows that he was hired at the jobsite on November 7, 1990. That shows that Patterson had worked no more than 3 days before Moore was laid off on November 10. According to John Wayne Smith, during the days before Moore's layoff, Patterson was observed by him working on the outage at the old boiler performing the job which Moore could not guarantee. Obviously that one job would not justify an objective determination that Patterson could and was willing to perform a full range of welding jobs.

In view of the above, my observation as to demeanor and the full record, I find that both Smith and Stuckey failed to testify truthfully regarding the reason why they selected Ralph O. Moore for layoff.

There is testimony, including for example the testimony of Aubrey Gregg, known as Bobo, dealing with Ralph Moore's work. Gregg was critical of the qualify of Moore's work. On cross, Gregg demonstrated confusion as what he observed about Moore's work especially during the outage job. I was not impressed with Gregg's demeanor or with his ability to recall what occurred during the fall 1990.

I found that Greg Reeves' denial that he questioned Moore about union badges was not believable. Reeves appeared to have vacillated in his testimony especially in regard to Ralph Moore. At times he testified that Moore was a good employee. Then in what appeared to be efforts to bolster the importance of his testimony he testified that he agreed with John Wayne Smith's criticism of Moore. I do not credit Reeves' testimony to the extent it conflicts with the testimony of Moore.

In line with my credibility findings, I find that Moore did not refuse to perform an assigned job on the week before he was discharged.

The direct evidence regarding that incident was unrebutted. Moore testified that he told Foreman Jack Blankenship that

he could not guarantee a weld because the area was so close that he could not wear his eyeglasses. Moore told Blankenship that he did not think anyone could guarantee to shoot 100 percent on that weld. Blankenship told Moore not to do the weld.

Blankenship did not testify. Moore's testimony regarding his conversation with Blankenship was not rebutted.

John Wayne Smith testified that he was told by Moore's welding partner Roy Farlow that they could not perform the weld.

To the extent their testimony conflicts, I credit Moore. As shown above Moore was not specifically rebutted in his testimony regarding the problem weld during the outage work. Additionally, I found that Smith exaggerated problems with Moore's work during his testimony.

I find that Respondent failed to prove that Moore illustrated reluctance to perform some assigned work. There was nothing other than subjective opinion testimony from John Wayne Smith, which supported that assertion by Smith.

The evidence illustrated that Respondent never did express unhappiness or concern with the quality of Moore's work until Moore was laid off on November 10. I find that the record did not support Respondent's contention that Moore was an inefficient worker.

Findings

The record shows that Ralph O. Moore, and the six other employees named in the complaint, were discharged on July 26, 1990, after they presented a letter to Respondent. That letter advised Respondent that the seven employees were on the union organizing committee. Respondent subsequently confronted each of the seven at their work about their wearing union badges. All seven were fired and Respondent asserted that each was fired because he was wearing a union badge in violation of Respondent's policy which prohibited wearing anything other than subcontractor badges. The record shows that was the only occasion in which employees were disciplined for wearing badges.

In view of the above, I find that the General Counsel proved, prima facie, that Respondent discharged the seven named employees on July 26 because of their union activities in violation of Section 8(a)(1) and (3) of the Act. In that regard, I also find that Respondent's rule against wearing badges was overly broad. That rule prohibited the wearing of badges at any time while at work and thereby prohibited badges during breaktimes as well as during worktimes. The evidence included some testimony to the effect that a large badge may pose safety problems under certain circumstances. However, the rule itself prohibited all badges other than subcontractor badges, without regard to size. The evidence illustrated that the rule was established to prohibit solicitation. I find that the record illustrated that the rule was not based on safety considerations and that it was used in an overly broad manner to protect against solicitation. In the only occasion when it was enforced it was used to prohibit union solicitation. The record failed to show special circumstances which justified Respondent's rule. *Asociacion Hospital del Maestro*, 283 NLRB 419 (1987); *Nordstrom, Inc*., 264 NLRB 698 (1982); *Our Way, Inc*., 268 NLRB 394 (1983); *Middletown Hospital Assn*., 282 NLRB 541 (1986).

Respondent failed to prove that the seven employees would have been discharged in the absence of protected activities. Respondent asserted the employees were fired because they were wearing unauthorized badges. However, the rule prohibiting unauthorized badges was illegally broad. Respondent failed to prove that the seven employees would have been confronted about their badges absent their presentation of the union organizing letter and absent their badges being union badges. There was no evidence showing that Respondent routinely confronted employees about unauthorized badges and the rule prohibiting badges applied to worktime which would include break periods.

In view of my finding above, I find that Respondent violated Section 8(a)(1) and (3) by discharging seven employees on July 26 because of their union activities.

The evidence shows that Respondent rehired instead of reinstated Ralph O. Moore. Ralph Moore offered evidence showing that he was treated as a new employee for purposes of qualifying for employee insurance coverage. The record was in conflict as to whether Moore was told by a timekeeper that he would not qualify for insurance for 45 days after his going back to work on August 16. However, there was no dispute over Moore's contention that he was not notified that his insurance entitlement was ever based on his original hire date of July 6, 1990.

Although Respondent offered testimony to the effect that Moore was mistaken in his testimony that a timekeeper told him that he would not be entitled to insurance until the waiting period after August 16, Respondent failed to rebut Moore by showing that it ever advised Moore that his insurance entitlement was based on his original hire date.

Moore's employment/termination form shows that he was hired rather than reinstated, at the jobsite on August 16, 1990. That form also shows that Moore was previously employed by Respondent from July 6 to 26, 1990.

I find that General Counsel proved a prima facie case that Moore was treated as a new hire when he returned to work on August 16, 1990. Moreover, Respondent failed to prove that Moore was ever treated as a reinstated employee. By its action in rehiring rather than reinstating Moore, Respondent failed to comply with the terms of its settlement agreement which required Moore to be reinstated to his former job without prejudice to his seniority.

In view of my determination that Respondent failed to comply with the terms of the settlement agreement when it failed to reinstate Moore, as well as my finding that Respondent engaged in unfair labor practices after the settlement, the settlement agreement must be set aside. *YMCA of Pikes Peak*, 281 NLRB 998 (1988).

The General Counsel alleged that after Moore returned to work for Respondent on August 16, he was laid off on November 10, 1990, because of his union activities. Respondent contended that Moore was laid off because he failed to perform on the job as well as other welders that were retained.

The record illustrated that Ralph O. Moore possessed a wide variety of skills both within and outside his job of heliarc welder. Moore performed several different welding jobs while employed by Respondent at Courtland. Moore's employment record included an indication that he could perform both pressure and nonpressure welding, rigging and high work, handling construction material, interpret drawings, handling and setting plant equipment, setting and aligning equipment, pipefitting, metal work and steel erection.

The record proved without conflict that Moore was laid off on November 10, 1990, at a time when Respondent retained new hires including Boilermakers welders Douglas Patterson and Edgard L. Pounds, who had been employed for only a few days.

Moore was designated as a Boilermakers welder (BMW1), as were Patterson and Pounds.

The record shows that Respondent hired Edgard L. Pounds as a BMW1 during the week ending November 4, 1990. Douglas Patterson was hired on November 7, 1990. Patterson worked 16 weeks before he was laid off during the week ending March 24, 1991. Pounds worked 20 weeks before he was laid off during the week ending March 24, 1991.

Additionally, as Charging Party pointed out in its brief, Respondent hired several Pipefitter welder employees after Moore was laid off. Moore was qualified to perform in that job classification and Respondent admittedly had a policy of cross-crafting its employees.

From November 10 until its Courtland job ended, Respondent hired at least eight Pipefitters welder (PFW1) employees.

The evidence including Moore's July 26 discharge; Moore's rehire as opposed to reinstatement; the comments by Respondent's personnel manager that he did not appreciate employees trying to organize the job; Superintendent McNutt's comments regarding Jonathon Rudolph quitting; and the questioning of Moore by Greg Reeves regarding Moore's union badge, illustrates Respondent's animus against Moore because of Moore's union activities.

As shown I credit Moore's testimony regarding all the above elements which, with the exception of matters regarding the rehire question and Greg Reeves' denial that he questioned Moore about the union badge, was not denied. There was no denial offered regarding the alleged comments by the personnel manager or by Superintendent McNutt even though McNutt testified about other matters.

The record, including especially the matters discussed above under credibility determinations, shows that Respondent's asserted bases for Moore's November 10 layoff, were pretextuous. The record shows that Respondent falsified its reason for selecting Moore for layoff. John Wayne Smith and Danny Stuckey testified that Moore was selected for layoff by them because of his work record and because Douglas Patterson demonstrated that he could more competently perform a wide range of welder jobs than Smith.

Credited evidence proved that Smith and Stuckey testified falsely. The record proved that shortly before Moore was laid off, Smith asked Moore to stay on rather than quit over the completion of premium work and they asked Moore if he was interested in transferring to an out-of-state job. That evidence plus evidence showing they did not have an opportunity to determine that Douglas Patterson could perform a wider range of welding jobs more competently than Moore, demonstrated that Smith and Stuckey misrepresented the reasons for the layoff of Moore.

''A pretextual reason, of course, supports an inference of an unlawful one.'' *Keller Mfg. Co*., 237 NLRB 712, 717 (1978).

I find that the General Counsel proved that Ralph O. Moore and six other employees were discharged on July 26 because of their union activities; that Respondent rehired, but did not reinstate, Moore; and that Ralph O. Moore was selected for layoff on the bases of allegations which were shown to be false.

In addition to the evidence showing that Respondent's asserted bases for Moore's layoff were pretextuous, the record proved that Moore engaged in union activities and that Respondent knew of those activities which occurred both on July 26 and after Moore's rehire on August 16.

In view of the entire record especially that evidence showing animus, knowledge of Moore's union activities, and pretext as to the basis for Moore's November 10 layoff, I find that the General Counsel proved, prima facie, that Respondent was motivated to lay off Ralph Moore because of Moore's union activities.

I find that Respondent failed to show that Moore was laid off for reasons not associated with his union activities. As shown above, I find that Respondent's asserted reasons for the selection of Moore were untrue. Respondent failed to prove that it had other reasons, which were not dependent upon Moore's protected activities, for Moore's selection for layoff. Respondent did not prove that Moore would have been discharged on July 26; reemployed on August 16; or laid off on November 10, 1990, in the absence of union activities of its employees. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Delta Gas, Inc*., 283 NLRB 391 (1987), enfd. 840 F.2d 309 (5th Cir. 1988); *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987); *Yaohan of California*, 280 NLRB 268 (1986).

Earl Phillips

Earl Eddie Phillips worked for Respondent as a boilermaker fitter and rigger from August 14 to September 6, 1990.

Phillips solicited for the Union and passed out union handbills before and after work while he worked for Respondent at their Courtland, Alabama job. Phillips passed out leaflets in the presence of supervisors. He also wore a union organizing committee badge while at work.

On August 24, Phillips was shown a written counseling form by Superintendent Greg Reeves. The form indicated it was a written warning for unsatisfactory work performance. Under description of incident, Reeves wrote:

> Mr. Phillip's has on several occasion's been sighted writing a minute by minute log book of work duties instructed by Supervisor's & job surrounding activity's. This occupy's most of his time. Unabling him to do his job.
>
> Further violations will result in: Termination

Phillips did maintain a logbook in which he made notations regarding his work.

Phillips testified that he was told by Greg Reeves that the warning would not go into his personnel file. Reeves told him that he did not have complaints about Phillips' work other than Phillips' keeping notes on the job. Reeves told Phillips that he was doing a fine job.

Greg Reeves admitted that he told Phillips that the written warning ''ain't got to be no big deal.'' Reeves testified that he did not tell Phillips that he would not place it in Phillips' file. Reeves admitted that Phillips appeared to believe that he

had been told that the notice would not go in his personnel file. Reeves disagreed with Phillips regarding the quality of Phillips' work. According to Reeves he suspected that Phillips was loafing when there was no supervision in the area to watch Phillips and Reeves received numerous complaints from other employees regarding Phillips' note taking during work. Reeves testified that some other employees expressed concern that Phillips was writing something about them in his notebook.

On August 28 Phillips, along with employee Ronnie Dexter, took a list of hazards and safety problems on each floor, to Respondent's safety man. Later that day Phillips' supervisor, Todd Williams, brought him the list of safety problems for their floor and told Phillips to correct the problems.

On the following morning, Assistant Superintendent Danny Stacey told Phillips there had been a change in command and that in the future, Phillips should report safety matters to his foreman rather than to the safety man. Stacey had overheard Phillips talking to the safety man about an untied oxygen bottle shortly before Stacey talked with Phillips.

On the morning of September 6, 1990, Phillips' foreman Todd Williams told Phillips, ''Greg Reeves got drunk last night and he's in a bad mood, so watch yourself today. You know how Greg is.''

According to Phillips, he was discharged that day even though he was working under unsafe conditions and even though he was producing at a higher than average rate of production. Phillips testified that he complained about his work area needing scaffolding but that Respondent never did construct the scaffolding. Phillips was working some 200 feet up and he had to straddle beams with his legs 4 feet apart with a safety line tied around his waist.

Around 9:30 a.m., while Phillips was waiting for his helper to return with equipment, Greg Reeves came over and discharged Phillips. Reeves told Phillips, ''I've been watching for a couple of days and you haven't been doing your job or your work.'' Phillips testified that he was wearing his union badge at the time of his discharge. During his discharge Phillips learned that his August 24 written counseling report had been placed in his personnel file. According to Phillips, Reeves had assured him that counseling report would not be included in his personnel file.

Ronnie Dexter testified that he observed Phillips' work on frequent occasion while Phillips worked for Respondent. According to Dexter, Phillips was a good worker. Dexter recalled that Phillips' crew of Phillips and two others, fitted some 58 tubes during the 3 days ending on the day Phillips was discharged. Dexter and his crew of two others, fitted 38 tubes during that same period. Dexter did admit on cross, that his two crew members were not as fast as the two that worked with Phillips.

However, Franklin Coleman testified that he worked with Phillips and he disagreed with Dexter's testimony regarding the quality and speed of Phillips' work. Coleman recalled that he complained to Gregg Reeves about Phillips being assigned to work with Coleman. Coleman testified that he asked Reeves, are ''you mad at me putting me with Fast Eddie [Phillips].''

Credibility Determinations

Earl Phillips was somewhat evasive on cross-examination and he tended to argue with Respondent's attorney. Phillips' gave extensive explanations about difficulties with his work.

Phillips was not always responsive to questions especially following direct examination. For example on redirect he was asked about the amount of time he spent on training his helper during the last 2 days he worked. Phillips failed to respond to that query even though he was asked on two occasions to direct his response to time required to train rather than an explanation of what was involved in training.

I noticed that Phillips' testimony differed in some respects from other evidence offered by the General Counsel and Charging Party. For example, Phillips testified that he took notes only during lunch, breaktimes and before and after work, with only one exception. The exception was the occurrence which resulted in Phillips being warned. That testimony differed from the testimony of Ronnie Dexter. Dexter who worked with Phillips was called by the General Counsel. Dexter testified that before Phillips' August 24 warning, Phillips would make notations in his notebook during work while Phillips was waiting for the welders to weld.

In most respects, I found the testimony of former superintendent Greg Reeves was less than believable. However, as to critical testimony regarding Phillips, Reeves was supported by the testimony of Dan Stacey.

To the extent their testimony conflicted, I credit Reeves over Phillips.

As to Phillips Reeves testified,

> He always had some big deal. Some reason he wasn't working.

That particular insight offered by Reeves was in full accord with the manner of Phillips' performance as a witness. Phillips offered extensive reasons why he was handicapped in his jobs during the short period he worked for Respondent.

In view of the above and my determination as to Phillips' demeanor, which was not good, I credit the testimony of Greg Reeves and Dan Stacey as to the events that led to Phillips' discharge.

Findings

The question regarding Respondent's motivation for the discharge of Earl Phillips is difficult. Phillips worked for Respondent for a short period of time. Nevertheless, during that time he was involved in union activities and in safety-related activities.

Despite his activities which are protected, I am convinced that Respondent believed that Earl Phillips was loafing on the job. The evidence from Dan Stacey, that he watched while Phillips repeatedly loafed when out of view of supervision, is convincing.

Regardless of an employee's union affiliation, an employer is not obligated to tolerate loafing to an extent greater than is tolerated by nonunion employees. There was no evidence offered to show that Respondent tolerated loafing by employees that were not involved in protected activity.

The credited testimony of Superintendent Dan Stacey proved that on the day of Phillips' discharge, Stacey was above Phillips' work area when he noticed that Phillips did not work for 20 minutes until Greg Reeves came into the area. After that incident, Stacey and Reeves determined that Stacey would observe Phillips on occasion when Reeves left the area. Stacey observed that Phillips routinely ''sat down'' when his supervisor was out of sight.

Reeves and Stacey communicated by radio after Stacey placed himself so that he could observe Phillips from above. Phillips again sat down and did not work when Reeves left Phillips' work area. Stacey watched and reported by radio to Reeves when Reeves left, that Phillips had sat down. As Reeves returned, Phillips got up and appeared to work. When Reeves was away on that occasion, Stacey continued to watch Phillips for over 30 minutes. Phillips sat without working for that full period which was not a breaktime. After discussing the events and his planned action by phone with Stacey, Reeves returned to Phillips and discharged him.

Respondent showed through its termination records that it routinely discharged employees for infractions similar to its allegations regarding Phillips. Other employees, as shown in Respondent's Exhibit 6, were discharged for sitting down on the job and because of lack of production.

There was evidence that Danny Stacey told Phillips that the chain of command had changed and that Phillips was to report safety matters to his foreman rather than to the safety man. I presume in view of Phillips' unrebutted testimony, that Respondent observed Phillips wearing a union badge and passing out union leaflets.

Nevertheless, an employee is not protected by the Act from disciplinary action simply because he engages in protected activity. In order to establish a violation it is necessary for the General Counsel to prove that the employer was motivated by the protected activity. Here, the evidence may establish a prima facie basis for such a determination. However, in view of the credited evidence showing that Respondent caught Phillips loafing on the job, I find that Phillips would have been discharged in the absence of protected activities. *Ruff Electrical Construction Co.*, 296 NLRB 501 (1989); *Canandaigua Plastics*, 285 NLRB 278 (1987); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The complaint was amended to allege that the warning issued to Phillips on August 24 was an additional violation of the Act. As shown above, the record shows that Phillips was making notations in his logbook during work. I find that the General Counsel failed to show that Respondent was motivated to issue the warning by Phillips' protected activity and, in any event, the record illustrated that Phillips was guilty of the infraction alleged in the warning and that he would have received the warning in the absence of his protected activity. I do not credit Phillips' testimony to the effect that he was told the warning would not be placed in his personnel file.

Timothy Owens

Timothy Owens worked almost a year for Respondent—from October 1989 until September 11, 1990. Owens operated a backhoe.

Owens signed a union authorization card on August 16, 1990. Beginning on the following Monday, August 20, Owens wore a union badge while at work.

On August 20, the day Owens first wore a union badge to work, he was told, for the first time, to get off his backhoe and help the laborers. Laborer Foreman Wendell Frost told Owens that Civil Superintendent Charlie Russell had told him to have Owens get off the backhoe and help the laborers get concrete up the elevator. While helping the laborers, Owens was injured when a wheelbarrow he was helping up a ramp to an elevator ran over his foot. For a time after that incident Owens was placed on light duty. While on light duty, Owens ran an elevator.

While he was running the elevator Greg Reeves, the boilermaker superintendent, asked Owens why was a backhoe operator wearing a Boilermakers union badge. Owens did not respond to Reeves' question.

Owens had a seat (i.e., a chair or stool) on the elevator. On the second day he ran the elevator while on light duty, General Foreman Joe Duran came on the elevator and removed Owens' seat.

About the last week of August, Owens overheard a conversation near his backhoe involving Foreman Wendell Frost and some members of Frost's crew of laborers. Frost pointed to a laborer that was picking up sticks and paper who had worn a union badge to work. Frost said, ''See there, that's what the union badge will do for you. A laborer has no reason—or no right to be wearing a union badge.'' Owens overheard Frost go on to tell the laborers they were hired in there to work and that's what he expected them to do. Owens testified that he heard Frost tell the employee that was wearing the union badge that if he did not get a certain area picked up in a certain amount of time that he was gonna have to fire him.

Wendell Frost testified that he did not recall ever pointing out anyone for wearing a union badge. Frost testified that he did not recall any laborer, other than Tim Owens who was an operator, wearing a union badge.

On August 27, Owens was taken off light duty. He returned to work on the backhoe. Joe Duran and Wendell Frost told Owens that he was to get off and help the laborers when he was not busy on the backhoe.

Owens testified that other operators including the crane operators, cherry picker operators, and forklift operators were not required to get off their equipment and help laborers.

On one occasion, according to Owens, while he was talking with a laborer foreman that he identified as Cecil Roberts, a crane operator was sitting on his crane reading a paper. The foreman told Owens that he could not understand why they were so hard on Owens when other operators sat around on their machines reading papers. Roberts told Owens ''a man's got his own right to do what he wants to do as far as wearing a union badge, you know, or whatever.''

There was no supervisor named Cecil Roberts. The parties agreed that the supervisor described by Owens was a supervisor named Cecil Moye.

On his last day before his discharge, after dinner, Owens was working with two laborers in loading the backhoe, driving it to the dumpster and dumping scrap wood. According to Owens' testimony, he got some splinters in his hand while reloading some scrap wood that had fallen out of his backhoe. When he returned and the laborers were loading another

load of scrap wood, Owens sat on the backhoe and attempted to remove splinters from his hand with his fingernail clippers.

While there, Superintendent Russell came to Owens and told him to get off and help the laborers load his backhoe. Owens testified that he got off and walked into the building where the laborers were getting scrap wood.

Owens' testimony from that point follows:

> The laborers were just piddling around 'cause there wasn't no more wood in there to get.
>
> I was standing there trying to get the splinters out of my hand, and the freight elevator—that's what they haul material up and down with—it came down and brushed me on the shoulder.
>
> Well, Joe Duran walks up and he said, ''Didn't your supervisor tell you to get off and help the laborers load the bucket?''
>
> And I said, ''Yes, Joe, he did.'' I said, ''They've got my bucket loaded.'' And I was trying to show him my hand and the splinters but he didn't act like he was concerned. He said, ''Didn't your supervisor tell you to get down and do that?''
>
> I said, ''Yeah.''
>
> He said, ''The big man has been on me about you.'' He said, ''Come on; let's go to the gate; you're fired.''

Before his discharge, Owens had received one warning. Around September 1989, he was warned about absenteeism.

Respondent did not dispute that Owens was required to help the laborers in addition to his backhoe duties.

Joe Duran who was the general foreman, testified that he told Owens to help load the backhoe on occasions when it was necessary to load the backhoe by hand. Duran recalled that he told Owens to help load both before and after he noticed Owens wearing a union badge.

According to Wendell Frost, when Frost first became laborer foreman, Owens, who was under Frost's supervision, was busy with excavation work. When the job began to play out there was not enough excavation work to keep the backhoe operator busy full time. Both Duran and Frost testified they were told by supervision, to keep the backhoe operator as well as other employees, busy.

Charles Russell who was formerly employed by Respondent as civil superintendent, testified that he was hired at the Courtland job on June 7 or 8, 1990. Russell was over the general foreman, Joe Duran, who, in turn supervised the foremen.

When Russell was hired, there was some excavation work remaining under the ''precipitator.'' That work lasted only a few weeks. From that time until the job was completed there was only occasional work for the backhoe. Russell admitted that at that time he directed his general foreman, Joe Duran, to keep the backhoe operator busy. According to Russell the loading of trash required loading by hand on occasion and it was on those occasions, unlike the situation when earth was being moved or when trash could be loaded by scooping, that the backhoe operator could help by getting down off his machine.

Credibility Determinations

As to the question of credibility, I credit Tim Owens' testimony regarding the late August conversation overheard by him in which Wendell Frost commented on a laborer wearing a union badge. As to that incident, Frost appeared uncomfortable. Frost appeared to protest too vigorously as to the reason why he would not point out any one for wearing a union badge.

The record shows that Owens was mistaken in his identity of a foreman as Cecil Roberts. That foreman was actually Cecil Moye. In many respects, I credit the testimony of Cecil Moye. Moye did not deny that he told Owens that he did not understand why Respondent was hard on Owens when other operators were permitted to sit on their machines and read papers and that a man has a right to wear a union badge.

I credit the testimony of Timothy Owens. Owens testified about several matters which did not reflect favorably on his case. Additionally, with the exception of the testimony of Joe Duran regarding Owens' discharge and Wendell Frost as to his comments about a laborer wearing a union badge, there was little evidence which directly conflicted the testimony of Owens. There was some dispute as to whether Owens was removing splinters with a nail clipper or clipping fingernails with a nail clipper, before his discharge. However, due to the close similarities between those two observations, I am not persuaded that reflects an actual conflict.

As to the incident which led to Owens' discharge, I found Owens to be a credible witness and I credit his account of that incident.

Cecil Moye testified that he observed Owens was just sitting on the backhoe when Superintendent Russell told Owens to assist the laborers load the backhoe. Owens got off the backhoe and walked over to the laborers but, instead of helping the laborers, Owens stood there and clipped his fingernails. I find that Moye's observations were reasonable even though I credit the testimony of Tim Owens. According to Owens he was not clipping his nails. Instead Owens contends that he was using his nail clippers to try and remove splinters from his hand.

I do not credit the testimony of Joe Duran regarding the events that led to Owens' discharge. The testimony of Duran differed from Owens as to whether Owens volunteered that he was ready to leave the job. In view of the entire record and my observation of the demeanor of Duran and Owens, I am persuaded that Tim Owens' testimony was correct.

I find that Owens was told to get off his tractor and help the laborers load. Subsequently Duran came over and fired Owens when he observed Owens standing near the laborers using his fingernail clippers to try and remove splinters.

Findings

There are two general complaint allegations regarding Tim Owens. It is alleged that Wendell Frost told employees that an employee had received a work assignment because that employee was wearing a union badge. As shown above that alleged comment was overheard by Tim Owens. I credited Owens in that regard and find that Wendell Frost told members of his crew during the last week in August 1990, that a laborer was picking up sticks and paper because he was wearing a union badge and that a laborer had no right to

wear a union badge. I find that comment constitutes a violation of Section 8(a)(1) of the Act.

Other allegations in the complaint involve an alleged change in Owens' job duties and Owens' discharge.

Credited evidence shows that Timothy Owens was first told to get off his backhoe and help the laborers, on the day he first wore a union badge. Before that occasion Owens' job duties were exclusively those of an operator.

I find that the General Counsel proved a prima facie case including proof of Respondent's animus toward Owens' union activities; Respondent's knowledge of Owens' union activities; and timing as to Respondent's knowledge and its subsequent adverse actions toward Owens.

As to animus, credited evidence proved that Owens' job was changed when he started wearing a union badge; Owens was asked by Superintendent Reeves why he, an operator, was wearing a Boilermakers union badge; Owens was deprived of a seat in the elevator on the second day he was on light duty when Joe Duran removed the seat and offered no explanation to Owens as to why the seat was being removed; Foreman Frost commented that a laborer was picking up trash because he was wearing a union badge and Frost then threatened the laborer with discharge unless he finished his job in a timely manner; and Foreman Moye told Owens that he did not understand why Respondent was hard on Owens and not hard on other operators and that a man should have the right to wear a union badge.

There was no dispute but that Owens' job changed. I credit Owens' testimony showing that change actually occurred on the day he first wore a union badge at work.

As shown above, I credit the testimony of Owens that Superintendent Greg Reeves asked him why he, an operator, was wearing a Boilermakers union badge.

I also credit Owens' testimony that Joe Duran removed the seat from the elevator without explanation and I credit Owens' testimony as shown above, regarding Wendell Frost's comments in violation of Section 8(a)(1).

Finally, as to this particular element of proof, I credit Owens' testimony, which was unrebutted, that Foreman Moye (Roberts), explained that he could not understand why Respondent was harder on Owens than other operators and that a man should have the right to wear a union badge.

As to knowledge, none of Respondent's supervisors denied that Owens did wear a union badge while at work. Owens testified without rebuttal that he started wearing a Boilermakers union badge at work on August 20, 1990.

As to timing, the credited evidence proved that immediately on Owens' first wearing a union badge to work on August 20, Respondent changed his job duties. Owens was told to get off his backhoe and help the laborers. Before that day Owens had never been required to get down and help. Subsequently, approximately 3 weeks after he started wearing a union badge, Owens was fired after being told to get off his machine and help the laborers load his backhoe. Owens did as he was told. He got off the backhoe but, on his realization that the laborers had completed the loading of his backhoe, he tried to remove some splinters from his hand with his fingernail clippers. At that time, Superintendent Duran came over and discharged Owens.

That evidence proves, prima facie, that Respondent changed Owens' job duties and discharged Owens because of Owens' wearing a union badge while at work.

Respondent offered evidence showing that the Courtland job was winding down and that the nature of the backhoe work changed as a result of that, as opposed to changing because of union activity.

According to Respondent, as the Courtland job was nearing completion the nature of the work for the backhoe had to change. Before that time Respondent used the backhoe to move earth and dig ditches.

Respondent contended that the character of the backhoe job after August lent itself to having the backhoe operator help load his machine. The backhoe was used to remove some trash that required loading into the backhoe by hand. While the backhoe was being loaded by hand, the backhoe remained stationary. There was nothing for the operator to do other than help load or to sit on the machine doing nothing while other employees loaded the backhoe. Such was not the case with other jobs with other equipment such as the cherrypicker or the crane. Those operations did not lend themselves to the operator getting off the machine and helping by hand.

In cases of this type jurisprudence requires me to first determine whether the General Counsel has proved a prima facie case and, if that answer is yes, then I must question whether the allegedly violative actions would have occurred in the absence of protected activities. Before I can determine that a violation has been proved, I must determine that substantial evidence supports a finding that the General Counsel proved a prima facie case and that Respondent failed to prove that the actions would have occurred in the absence of protected activities.

As shown above, I find that the evidence illustrated conclusively that Respondent was motivated to change Owens' job duties and discharge him because he started wearing a union badge. Despite a showing that Respondent's job was winding down, I find that Respondent failed to prove that Owens' job would have changed and he would have been discharged in the absence of his union activities.

In that regard I am mindful that the duties of the backhoe differed from the duties of the cranes and cherry pickers. It was possible for a backhoe operator to help load his backhoe when moving small items of trash while there was no showing that the duties of the cranes or cherrypickers lent themselves to individual assistance. Nevertheless, the timing of Respondent's instructions to Owens was never explained. There was no showing why Respondent's instructions to Owens to get off his machine and help load occurred precisely on the day he started wearing a union badge.

Additionally, I find that the credited evidence proved that this was not a situation where Respondent simply expanded the duties of the backhoe operator to include loading the backhoe. Respondent argues that Owens' job change was limited to those occasions where his backhoe was being loaded by hand by one laborer. According to Superintendent Russell, his instructions were to have Owens help load on those occasions only.

However, the credited record shows that beginning on the first day Owens wore a union badge, he was told by his foreman, that Superintendent Russell had ordered him to have Owens get off the backhoe and help the laborers get concrete up the elevator. That illustrates that Owens' job change was far more extensive than simply helping to load his machine on those occasions when a single laborer was loading small trash into the backhoe.

Finally, Owens was fired on September 11 before he was permitted to explain why he was not loading the backhoe. Owens had obeyed Superintendent Russell's instructions to get down off the machine. As shown above, after Owens walked over to the laborers, Joe Duran walked over to Owens and fired him even though Duran admittedly did not hear Russell's instructions to Owens and Duran failed to consider Owens' explanation for his actions. Although Owens explained that his backhoe had already been filled by the laborers and Owens tried to show Duran that he was removing some splinters from his hand, Duran did not pause to consider either of those matters.

In view of the above, I am convinced that Owens' job duties were not changed because of overall changes in the character of the job. His changed duties were more extensive than was necessary to accommodate the alleged change in requirements for the backhoe. Respondent's asserted reasons for the changes in Owens' job and for his discharge, do not accord with the credited evidence. I find that the credited record failed to support Respondent's contentions. Respondent failed to prove that Owens would have been discharged in the absence of his protected activities. *Hunter Douglas, Inc*., 277 NLRB 1179 (1985); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Delta Gas, Inc*., 283 NLRB 391 (1987), enfd. 840 F.2d 309 (5th Cir. 1988); *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987); *Yaohan of California*, 280 NLRB 268 (1986).

CONCLUSIONS OF LAW

1. Sunland Construction Company, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by threatening its employees that an employee received an unfavorable work assignment because the employee was wearing a union badge, engaged in conduct violative of Section 8(a)(1) of the Act.

4. Respondent, by discharging employees Timothy Owens, Larry Jackson, Charles F. Kilpatrick, Ralph O. Moore, Dan H. Murchie, James C. Robbins, Jonathon L. Rudolph, and Thomas C. Vickers, changing the work assignments of Timothy Owens and by refusing to reinstate and laying off employee Ralph O. Moore, because of its employees' activities on behalf of Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO has violated Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has illegally discharged its employees in violation of sections of the Act, I shall order Respondent to offer Timothy Owens, Larry Jackson, Charles F. Kilpatrick, Ralph O. Moore, Dan H. Murchie, James C. Robbins, Jonathon L. Rudolph, and Thomas C. Vickers immediate and full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. I further order Respondent to make Timothy Owens, Larry Jackson, Charles F. Kilpatrick, Ralph O. Moore, Dan H. Murchie, James C. Robbins, Jonathon L. Rudolph, and Thomas C. Vickers whole for any loss of earnings they suffered as a result of the discrimination against them and that Respondent remove from its records any reference to the unlawful actions against its employee and notify Timothy Owens, Larry Jackson, Charles F. Kilpatrick, Ralph O. Moore, Dan H. Murchie, James C. Robbins, Jonathon L. Rudolph, and Thomas C. Vickers in writing that Respondent's unlawful conduct will not be used as a basis for further personnel action. Backpay shall be computed as described in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

If it is necessary to determine whether Larry Jackson, Charles F. Kilpatrick, Dan H. Murchie, James C. Robbins, Jonathon L. Rudolph, and Thomas C. Vickers were reinstated following their July 26, 1990 terminations, that issue may be considered in compliance proceedings.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Sunland Construction Company, Inc., Courtland, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in conduct in violation of Section 8(a)(1) by threatening its employees that an employee received an unfavorable work assignment because the employee was wearing a union badge.

(b) Discharging, failing to reinstate, changing the work assignments, and laying off its employees because of their protected activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Timothy Owens, Larry Jackson, Charles F. Kilpatrick, Ralph O. Moore, Dan H. Murchie, James C. Robbins, Jonathon L. Rudolph, and Thomas C. Vickers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make Timothy Owens, Larry Jackson, Charles F. Kilpatrick, Ralph O. Moore, Dan H. Murchie, James C. Robbins, Jonathon L. Rudolph, and

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Thomas C. Vickers whole for any loss of earnings plus interest, they suffered by reason of its illegal actions.

(b) Rescind its discharges issued to Timothy Owens, Larry Jackson, Charles F. Kilpatrick, Ralph O. Moore, Dan H. Murchie, James C. Robbins, Jonathon L. Rudolph, and Thomas C. Vickers; its change in work assignments issued to Timothy Owens; and its layoff issued to employee Ralph O. Moore, and remove from its files any reference to those actions, and notify each of those employees in writing that this has been done and that evidence of its unlawful actions will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, and timecards, personnel records, reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Courtland, Alabama, copies of the attached notice marked ''Appendix.''[2] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''